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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 204

WILLIAM HENRY HACKETT,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GOLDFARB and HUDNUT,
ALBERT A. GOLDFARB,
Attorneys for Petitioner,
2001 Cadillac Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled cause on May 25, 1962.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported; a copy of the opinion is printed in Appendix B, *infra* pages 23-25. There was no written opinion in the District Court for the Eastern District of Michigan, Southern Division.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on May 25, 1962. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutory provisions involved are Title 21, U.S.C., Section 174, and Title 26, U.S.C. Section 4705(a), which are set forth completely in Appendix A, *infra* pages 21-22.

QUESTIONS INVOLVED

1. Were the Appellant's rights prejudiced by the rulings of the trial judge on the evidence respecting entrapment, and his refusal to direct a verdict of acquittal based on entrapment?

2. Should the trial court have required the Government agents to produce notes taken during an interview with the informer for an *in camera* inspection by the Court under the Jencks Act, or at least to account for their whereabouts?

3. Should the evidence seized from the Appellant at the time of his arrest have been suppressed as the fruit of an illegal search and seizure?

4. Did the trial court err in admitting an alleged confession of the Appellant without corroborating the fact that it was made, and when testimony of the Government witnesses indicated that inducements were given to the Appellant?

STATEMENT OF FACTS

On November 2, 1960, an indictment was returned in the District Court for the Eastern District of Michigan, charging the Appellant in five counts with violations of the federal narcotic laws, specifically 21 U.S.C. 174 and 26 U.S.C. 4705(a) (R. Appellant's Appendix 1a). The facts out of which this indictment arose are as follows:

The Government's special employee (informer) Clifton Watson was arrested for narcotics violations in March of 1960 (R. Appellant's Appendix 99a). At that time, after being promised that no publicity would ensue from his arrest if he cooperated, Watson agreed to assist the Federal Narcotics Bureau to capture other violators of the federal narcotic laws (R. Appellant's Appendix 99a). The Government did not specify any particular persons to work on (R. Appellee's Appendix 30b) but he understood his job to be that of going out and inducing whatever individuals he could to sell him narcotics (R. Appellant's Appendix 105a). On several occasions, he would be called down to the Narcotics Bureau and asked when he was going to come up with something (R. Appellant's Appendix 101a).

Clifton Watson had been a close friend of William Henry Hackett for a number of years. They visited at each other's homes, exchanged gifts, Watson would take out Hackett's children (R. Appellant's Appendix 102a, R. Appellee's Appendix 35b). On several occasions, if Hackett was in financial difficulty, Watson would loan him money to see his way out of it, even on one occasion pawning his own ring to help his friend (R. Appellee's Appendix 34b). Watson was aware of the fact that Hackett knew a source of narcotics because two years previously, when Watson was attempting to procure cocaine, Hackett introduced him to a source in another state, although Hackett himself never bought any narcotics when he would take Watson to visit these sources (R. Appellee's Appendix 47b, 48b). Sometime subsequent to March of 1960 and prior to August of 1960, Watson conceived of the idea that he may be able to induce Hackett to sell him narcotics, and thereby fulfill his obligation to the Federal Narcotics Bureau. Prior to that time, he had never purchased any narcotics from Hackett (R. Appellee's Appendix 50b). Although at first Watson testified that Hackett agreed to sell him narcotics the first time he approached him, (R. Appellee's Appendix 36b), he subsequently stated that he had been talking to Hackett for a period of two to three months before Hackett would agree to sell him narcotics (R. Appellee's Appendix 37b). He also testified that he told Hackett he was in financial difficulties because of losses in the numbers business and needed Hackett's help to get into the narcotics business so he could get back on his feet (R. Appellee's Appendix 37b).

When Watson was finally able to convince Hackett to sell him narcotics, the sale was set for August 18, 1960. At that time the narcotic agents were listening by a Fargo transmitter attached to Watson and a receiver in their

car outside. Watson was searched before he went into the house, and given the money to purchase the narcotics. After the sale was made, he was again searched, and relinquished the narcotics to the federal agents (R. Appellant's Appendix 72a-74a). After this sale was made, Watson again approached Hackett, and told him that he had been losing heavily at the racetrack, and again needed his help to get out of his financial difficulties (R. Appellee's Appendix 45b). Again Hackett yielded to his friend's entreaties, and the second sale was set for September 19, 1960. At this time, one of the narcotic agents hid in the closet of the bedroom where the sale was transacted, and the conversations were monitored by other agents with the use of the Fargo transmitter and receiver (R. Appellant's Appendix 65a-67a, 76a).

When the informer Watson testified that he had induced the Appellant Hackett to sell him narcotics (R. Appellant's Appendix, 105a), the prosecution then sought to introduce evidence of a prior conviction of the Appellant, nine years previously, and also prior contacts with narcotics two or three years previously, when he introduced Watson to a source (R. Appellant's Appendix 106a). The defense counsel objected strenuously to the introduction of this evidence at this stage of the proceedings, and the Court at that point questioned him as to whether or not entrapment was an issue in the case (R. Appellant's Appendix 167a). In response to the Court's question, the defendants' counsel answered that it was his position that the testimony of the witness Watson had established entrapment, and requested a ruling from the court as to whether entrapment had been established as a matter of law (R. Appellant's Appendix 107a). The court questioned the defense counsel as to whether the defendant was going to assert the defense of entrapment on several

occasions, each time receiving an affirmative answer, although they were given somewhat reluctantly.

The last count in the indictment, that of possession on October 6, 1960, arose from a search made of Hackett and his car at the time of his arrest on that date. The Appellant moved to suppress the evidence seized at that time, on the grounds that it was the fruit of an illegal search and seizure. On January 30, 1961, testimony was taken with respect to this motion (R. Appellant's Appendix 1a, 35a-46a, 4b-11b). Federal narcotic agent, Theodore L. Vernier testified that on October 4, 1960, Watson called him at home and told him that Hackett's car was at the Metropolitan Airport, and that he would be coming in with a supply of narcotics. He then testified that he arranged for immediate surveillance at the airport (R. Appellee's Appendix 4b, 6b, 9b). He recognized Hackett's car parked at the airport (R. Appellee's Appendix 5b, 6b, and 9b), and he arranged to have the car disabled so it could not be driven away (R. Appellant's Appendix 43a). No warrant was obtained for his arrest, and on October 6, two days after the information was allegedly received, Hackett was arrested at the Metropolitan Airport, and he and the car were again searched, and heroin was found in a paper bag concealed in a camera case found on the seat of the car. The trial judge, over defendant's objection, permitted the evidence to be received, stating that the officers had probable cause to arrest, and therefore the incidental search was legal (R. Appellant's Appendix 46a, 47a).

During the trial, each agent who testified was asked for the notes which they had made during their surveillance of the Appellant about which they had just previously testified, and each and every one of them testified that

they had destroyed them (R. Appellee's Appendix 12b, 17b, 19b and 23b). Also, Watson testified that some notes were made during an interview which he had with the narcotic agents, and when the Appellant called for production of said notes to the court, the Government said that no such notes were in existence (R. Appellee's Appendix 52b) and the court insisted that if the defense counsel could not show that these notes, which he had never seen, qualified as a statement under the Jencks Act, he would not compel production of them for an in camera inspection (R. Appellant's Appendix 167a).

Also during the trial, the Government produced the District Supervisor of the Federal Bureau of Narcotics, who testified that the Appellant had made an oral confession to him in his office subsequent to his arrest. The Appellant objected immediately to this testimony (R. Appellee's Appendix 61b). Prior to the trial the Appellant had made a demand pursuant to Rule 16, for all statements made by the Defendant, either oral, written, electronically or stenographically recorded (R. Appellant's Appendix 30a). He was informed at that time that there were no such statements. The testimony relative to the confession was taken in the absence of the jury, and it revealed that the Defendant had talked to the District Supervisor in his office, and had made a full confession orally to him, and had been promised that he would be charged under the "old law" which carried a lighter sentence and would be sent to a special prison if he "cooperated". The Appellant objected to the admission of this confession on the grounds of inducement by implied promises, and the court ruled that the question was one for the jury, and permitted the jury to hear the alleged confession (R. Appellant's Appendix 174a).

On February 16, 1961, the jury returned a verdict of guilty on all counts (Appellant's Appendix 2a). On March 22, 1961, after the filing of an information charging the appellant with a previous conviction (R. Appellant's Appendix 144a, 145a, 163a), a sentence of 15 years on each count, the sentences to run concurrently, was rendered (R. Appellant's Appendix 2a, 145a, 164a). The Appellant filed notice of appeal timely in the United States Court of Appeals for the Sixth Circuit, and on May 25, 1962, the Court of Appeals affirmed the decision of the trial court.

REASONS FOR GRANTING WRIT

During the prosecution's case in chief, the prosecutor was allowed to introduce evidence of the Defendant's prior conviction nine years previously, and was also permitted to introduce evidence which was not relevant to the crime charged but tended to show the commission of other crimes. The justification for permitting this highly prejudicial evidence to come in at that point was to enable the prosecution to rebut the defense of entrapment. This procedure was highly unfair to the appellant and placed him in a very precarious position. Entrapment as a defense to a criminal charge has long been recognized by this Court (See *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 54 S.Ct. 210, 86 A.L.R. 249 (1932). Resting as it does on fundamental principles of public policy, the defense of entrapment should not be so easily frustrated by the premature injection of such prejudicial evidence into the trial. If such evidence is to be admitted, the defendant should at least be given an opportunity to present his case for entrapment to the jury before they are prejudiced by this evidence showing a prior conviction.

The rule laid down by the Supreme Court in *Sorrells v. United States*, 287 U.S. 435, 77 L.Ed. 413, 54 S.Ct. 210, 86 A.L.R. 249 (1932), to the effect that evidence of prior disposition is relevant to negative the defense of entrapment has resulted in the defense of entrapment being one that has several inherent disadvantages. In *Coronado v. United States*, 266 F.2d 719 (5th Cir. 1959), where the defendant sought to introduce his testimony on entrapment in the absence of the jury, the Court refused to permit him to do so, saying that the defendant must make the choice as to whether to plead the defense of entrapment, weighing all the advantages and disadvantages. In the instant case, although the trial judge refused to permit the defendant to introduce evidence of entrapment in the absence of the jury, he also took the choice of pleading the defense away from him. He questioned the defendant's attorney as to whether or not he was going to plead entrapment. It is clear that had the defense counsel denied at that time that he would use the defense of entrapment, when he finally had an opportunity to weigh the relative advantages and disadvantages, he would have been estopped to plead it then. Therefore, having gained an admission from defense counsel that entrapment would be part and parcel of his defense, the Court then declared that all this evidence was relevant to rebut the defense of entrapment, which at that point in the trial had not yet been affirmatively raised. The trial court's action in permitting the prosecution to introduce this evidence in its case in chief in essence gives the prosecution the ultimate choice as to whether or not the defendant will plead entrapment. If the prosecutor wishes to introduce evidence of the defendant's past record, he is no longer barred by the long-standing rule against this procedure. The de-

fendant who has been in trouble before then becomes a wide open defenseless target for the ruthless tactics of the prosecutor to get before the jury his entire background, from which there will never again be any escape. The jury, hearing that the defendant has committed crime before, is no longer sympathetic toward him. For all practical purposes, the time-honored presumption of innocence is trampled under the barrage of insinuations and inferences rushing from this extremely prejudicial, although irrelevant, evidence, and the man is again sent to prison, a victim of his past. To permit this type of evidence to be introduced during the prosecution's case in chief will deaden the jury's ear to anything the defendant could attempt to prove respecting entrapment, whether the prior conviction showed a predisposition or not.

Although the introduction of the evidence of the defendant's character and past record in the prosecution's case in chief represents a serious deterioration of the principles underlying our whole system of criminal jurisprudence and administration, this problem is merely a symptom of a much broader and more destructive practice. This is the practice of admitting this evidence in at all, regardless of at what stage of the proceedings it is admitted. Members of this Court have recognized the danger involved in permitting this type of evidence to be used to refute the defense of entrapment. Mr. Justice Frankfurter, in his concurring opinion in *Sherman v. United States*, 356 U.S. 369, 2 L.Ed. 2d 848, 78 S.Ct. 819 (1958), in which Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Harlan joined, unequivocally condemned the practice of admitting this type of evidence. He says (at page 383):

> "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, cer-

> tain police conduct to ensnare him into further crime is not to be tolerated by an advanced society * * * Permissible police activity does not vary according to the particular defendant concerned; surely if two suspects have been solicited at the same time and in the same manner, one should not go to jail simply because he has been convicted before and is said to have a criminal disposition. No more does it vary according to the suspicions, reasonable or unreasonable, of the police concerning the defendant's activities. *Appeals to sympathy, friendship*, the possibility of exorbitant gain, and so forth, can no more be tolerated when directed against a past offender than when directed against a law-abiding citizen. A contrary view runs afoul of fundamental principles of equality under law, and would espouse the notion that when dealing with the criminal classes, anything goes. The possibility that no matter what his past crimes and general disposition the defendant might not have committed the particular crime unless confronted with inordinate inducements, must not be ignored. Past crimes do not forever outlaw the criminal and open him to police practices, aimed at securing his repeated conviction, from which the ordinary citizen is protected. The whole ameliorative hopes of modern penology and prison administration strongly counsel against such a view."

Justice Roberts, Justice Brandeis, and Justice Stone, in the concurring opinion in *Sorrells v. United States*, supra, also expressed the same view.

The character and predisposition of the defendant can be extremely prejudicial to the defense of entrapment. Since the defense of entrapment is predicated on the idea that the police should not be permitted to use unfair tactics, a test which looks to the character and disposition of the defendant loses sight of the underlying reason for the

defense. Whatever may be the demerits of the defendant or his previous infractions of the law, this will not justify the instigation of a new crime as a means of punishing him for his past single and isolated mistake. Therefore, this Court should take this opportunity to reconsider its decision in the *Sorrells* case, in the light of the effect which it has had on the availability of the defense of entrapment to those who have committed crime before.

Furthermore, the defense of entrapment, being essentially a public policy defense, should be considered and decided by the court and not by the jury. When a question of illegal search and seizure is raised, the issue is never submitted to the jury to determine whether there was probable cause for the search. Since the same policy is at stake in questions of entrapment, there is no reason to submit this issue to the jury. As Justice Frankfurter, in his concurring opinion in *Sherman v. United States*, supra, said (at page 381):

> "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake."

It is the obligation of the court to protect themselves as instruments in the administration of criminal justice, from being used as instruments of oppression and injustice. The difficulties which may inhere in the decision of this issue do not justify the delegation of this important obligation to the jury. Justice Roberts made this point very definitely in *Sorrells v. United States*, 287 U.S. 435, 457, 77 L. Ed. 413, 54 S.Ct. 210, 86 A.L.R. 249 (1932), when he said:

> "The protection of its own functions and the preservation of the purity of its own temple belongs

> only to the court. It is the province of the court and the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention."

This Court should consider the opinion of Mr. Justice Roberts in *Sorrells v. United States*, supra, and Mr. Justice Frankfurter, in *Sherman v. United States*, supra, in the light of the policy decisions underlying the defense and reconsider the earlier opinions of *Sherman v. United States*, supra and *Sorrells v. United States*, supra, insofar as they indicate that the determination of whether or not there was entrapment is a question for the jury.

2. On cross-examination, each agent for the Federal Bureau of Narcotics indicated that he had destroyed the notes which he had made when he was monitoring the transactions between Watson and Hackett. If these notes had been in existence the Defendant would have been entitled to them under the Jencks Act (18 U.S.C. 3500). This is exactly what Mr. Justice Brennan, in his concurring opinion in *Palermo v. United States*, 360 U.S. 343, 354, 355, 3 L.Ed. 2d 1287, 79 S.Ct. 1217 (1959) predicted could happen under this Act. Unless some method is devised by which destruction of the relevant notes may be prevented, such as was done by excluding the evidence before the Jencks Act was enacted, then the agents can always prevent the defendant from compelling the production of the statements of witnesses, or notes that he has made, by destroying the original notes and recompiling them sometime later, so that they will not qualify under the "contemporaneous" requirement of the Jencks Act. This will

completely frustrate the policy of the Supreme Court regarding criminal discovery as expressed in *Jencks v. United States*, 353 U.S. 657, 1 L.Ed.2d 1103, 77 S.Ct. 1007 (1957), and later reaffirmed in *Campbell v. United States*, 365 U.S. 85, 5 L.Ed.2d 574, 81 S.Ct. 421 (1961). This Court should take this opportunity to correct this flagrant, but apparently customary, frustration of the intent and purpose of the Jencks Act.

Furthermore, Watson, on cross-examination testified that the agents made notes during one of the interviews they had with him. The Government insisted that these notes did not qualify under the Jencks Act, and the Court told the defense counsel that unless he could prove to the court that these notes qualified as statements under the Jencks Act, he would not order the Government to produce them. This action is in express contradiction to the Jencks Act, and the decisions of this Court construing it. Mr. Justice Brennan, in his concurring opinion in *Palermo v. United States*, supra, which was joined in by Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas, stated the proposition very emphatically:

> "The responsibility of the federal trial judge, it goes without saying, is not to be delegated to the prosecutor. Questions of production of statements are not to be solved through one party's determination that interview reports fall without the statute, and hence that they are not to be produced to defense counsel or to the trial judge for his determination as to their coverage. I am confident that federal trial judges will devise procedural methods whereby their responsibility is not abdicated in favor of the unilateral determination of the prosecuting arm of the Government."

It is apparent from the instant case that federal trial judges have not devised procedural methods to insure that

the responsibility of the trial judge is not abdicated in favor of the prosecutor. Because the defense counsel had never seen the notes, he could not determine whether they were substantially verbatim. He knew from the testimony of the witness that they were made contemporaneously, but it is the witness he is seeking to impeach, and he cannot discover from the witness in the presence of the jury, what was in the statement, so he can see if he can prove to the judge that it ought to be produced to the judge to determine if it complies. It is the judge's responsibility to find out if the statement complies with the Jencks Act, not the defense counsel's. Therefore, this Court should prescribe some rules for the guidance of the trial courts in applying this Act, at least insofar as when production for an in camera inspection should be required.

3. As respects the last count of the indictment, the defendant moved to suppress the evidence found in the camera case on the grounds that it was illegally seized. The testimony of the federal agents was to the effect that their reliable informer had told them that Hackett was coming in on a plane with some narcotics. This statement was contradicted at the trial by the informer who asserted that he had never told the federal agents anything about Hackett coming in at Metropolitan Airport because he didn't know anything about it. This situation presents a very difficult question as to when the reliability of the informer, and the fact that he gave the agents the information must be established. Because of the rulings of this Court in *Draper v. United States*, 358 U.S. 307, 3 L.Ed.2d 327, 79 S.Ct. 329 (1959) the federal agents seeking a search warrant, have asserted that they have acted on probable cause based on information received from a reliable informer. In the *Draper* case, it was clear that the informer was reliable. Here, where he is still awaiting trial on a

charge, and is at the mercy of the Government, the informer, when asked about this information, in open court asserted that he had not told the agents this. It appears that at least the informer should have been produced at the hearing on the motion to suppress the evidence, since the entire issue there was his reliability. This Court should define the scope of the *Draper* case in order that defendants, when confronted with this problem, can make a decision as to which course of action to take. For in this case, the defendant moved to suppress the evidence, the informer was not produced, and based on the evidence before him, the magistrate ruled that there was probable cause. At the trial, when it appeared that the search did not rest on reliable information from an informer at all, the court held that defense counsel was estopped to go into the issue at all, since he had raised it on a preliminary motion. This type of practice seems to be entirely inconsistent with the Fourth Amendment to the United States Constitution, and does not appear to be the intention of this Court when it decided *Draper v. United States.*

Furthermore, the information that the agents received, if it is assumed for the sake of argument that they did receive it, was received two days before the defendant was arrested. The car of the defendant was kept under constant surveillance, and was even disabled, so there was no opportunity for the defendant to escape. Therefore, there is no reason for the narcotics agents to have failed to obtain a warrant, and their failure to do so is also inconsistent with the Fourth Amendment and the decisions of this court in *Chapman v. United States,* 365 U.S. 312, 5 L.Ed.2d 828, 81 S.Ct. 776 (1961); *Johnson v. United States,* 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1947), and *Henry v. United States,* 361 U.S. 98, 4 L.Ed.2d 134, 80 S.Ct. 168 (1960). Therefore, this Court should correct

this error and define how far the motor vehicle exception, contained in *Carroll v. United States*, 267 U.S. 132, applies.

4. During the course of the trial, the Government sought to introduce evidence to the effect that the Defendant had made an oral confession to the District Supervisor of the Narcotics Bureau. There was no other evidence of the fact that a confession had been made other than that of an interested party, the District Supervisor, with no witnesses. Furthermore, prior to trial, the defendant moved for discovery of all the statements made by the Defendant under Rule 16 and Rule 6(a) of the Federal Rules of Criminal Procedure. The United States Attorney at that time informed the court that no such statements were made, and then when it appeared in the trial that a confession was necessary to sew up the case, the District Supervisor remembered an oral confession that the defendant had made to him. Because of the damaging effect of a confession, more should be required to show that one was in fact made than the unsupported testimony of an interested party. This point has never been considered by this Court. In *Smith v. United States*, 348 U.S. 147, 153, 75 S.Ct. 194, 99 L.Ed. 192 (1954), this Court decided that the truth of the matters contained in the confession would have to be corroborated. It is equally important to the rights of the defendant that the fact that he made an oral confession be corroborated, since he has no recourse to disprove it, except by a denial, which by then will sound very weak. The opportunities for unfairness to the defendant when dealing with oral confessions is manifold, and this Court should deal with the problem in such a way that there will be no question that the confession was in fact made.

Furthermore, the District Supervisor testified that certain inducements in the form of promises of easier treatment were given to Hackett. Specifically he was told that if he "cooperated" he would be charged under the "old law" which carries a lighter penalty, and would be able to get out on a personal bond. He actually was let out on a small bond until he indicated that he was going to defend himself. There is a question as to when these inducements were given to him. The District Supervisor indicated that they were given to him after he confessed, to induce him to entrap other individuals. Other testimony indicated that the agents had already determined his willingness to cooperate, before he ever talked to the District Supervisor. In *Crawford v. United States*, 219 F.2d 207 (5th Cir. 1955), rehearing denied 220 F.2d 352 (5th Cir. 1955), this exact situation was presented to the Fifth Circuit Court of Appeals, and it held that the confession was involuntary. This Court should consider this problem to determine to what extent offers made by the Narcotics Bureau for leniency when the defendant cooperates to entrap other individuals will render a confession involuntary.

Furthermore, permitting the jury to decide the issue is depriving the judge of a function which he had at common law. *At common law, it was the orthodox rule that* the judge was to determine the issue of voluntariness. Submission of the issue to the jury distorts the functions of the judge and jury as they were known at common law, and therefore operates to deprive the defendant of his right to trial by jury as it was known at common law and guaranteed by the Sixth Amendment. (See *Herron v. Southern Pacific R. R. Co.*, 283 U.S. 91, 51 S.Ct. 383, 75 L.Ed. 857 (1930). In *Stein v. New York*, 346 U.S. 156, this Court indicated that it was not a denial of due process of law for the state court to submit the issue to a jury, but

indicated that the rule would have been different if the case had arisen in a federal court. This Court should take the opportunity presented in this case to clarify this statement insofar as it relates to the federal court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

GOLDFARB and HUDNUT,
Attorneys for Petitioner,
2001 Cadillac Tower,
Detroit 26, Michigan.

Dated this 21st day of June, A. D., 1962,
Detroit, Michigan.

APPENDIX A

STATUTES INVOLVED

21 U.S.C. Section 174. Penalty—Evidence.—Whoever fraudulently or knowingly imports or brings any narcotic drug in to the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954 [26 §7237(c)]), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954 [26 §7237].

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. (Feb. 9, 1909, c. 100, §2 * * *.

* * * * *

26 U.S.C. Section 4705. Order Forms.

(a) General requirement.—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

* * * * *

APPENDIX B

OPINION

No. 14634

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, *Plaintiff-Appellee,* v. William Henry Hackett, *Defendant-Appellant.*	Appeal from the District Court of the United States for the Eastern District of Michigan, Southern Division.

Decided May 25, 1962.

Before Cecil and O'Sullivan, Circuit Judges, and Boyd, District Judge.

PER CURIAM. This is an appeal from a jury verdict finding the appellant guilty on all five counts of an indictment charging unlawful possession and sale of heroin. Title 21, U. S. C. A., Sec. 174; Title 26, U. S. C. A., Sec. 4705(a). Following the conviction and the prosecution of an information pursuant to Title 26, U. S. C. A., Sec. 7237, charging the defendant with a prior narcotics conviction the trial court imposed sentences of fifteen years on each of the five counts, the sentences to run concurrently.

The defendant did not testify in his own behalf nor did he tender other witnesses in the district court trial. He contends broadly on this appeal he was entitled to a verdict

of acquittal by the trial judge on the grounds of entrapment and that the trial judge erred in not directing such verdict on this ground as a matter of law. Though this insistence would seem to have no application with respect to count five of the indictment, the basis for the defendant's position concerning entrapment is that the government agents working through an informer, Clifton Watson, arranged with Watson for two purchases of heroin from the defendant. The trial judge ruled the question of entrapment was for the jury and he quite adequately instructed the jury in this connection. There was no exception to his charge. In our view the submission of this issue to the jury was proper and there was ample evidence from which the jury could reasonably find the defendant was not a victim of entrapment on the part of the government's agents. *Sorrells v. United States*, 287 U. S. 435 (1932); *Sherman v. United States*, 356 U. S. 369 (1958); *Masciales v. United States*, 356 U. S. 386 (1958); *Morales v. United States*, 260 F. 2, 939, C. A. 6 (1958).

The defendant raises questions under the Jenks Act (Title 18 U. S. C. A., Sec. 3500) relative to the production of notes and statements made by various government agents in the questioning of witnesses during the investigation of this case. The district judge in our opinion handled this phase of the trial properly and with much care. The defendants' rights were adequately protected in this regard, and there is no merit in this assignment by the defendant.

The defendant regarding count five of indictment takes exception to the trial court's denial of the defendant's motion to suppress the evidence which was seized without a search warrant at the time of the defendant's arrest. We find no support in the record for the assignment in this connection. There was in our opinion probable cause for the agents to believe that the defendant at the time of his arrest was committing an offense under the narcotic laws of the United States. Title 26 U. S. C. A., Sec. 7607; *Draper v. United States*, 358 U. S. 307 (1959).

Another issue on this appeal is whether the trial court erred in receiving in evidence certain statements made by the defendant to the government agents herein more than a week following his arrest while at liberty on bond. The defendant claims admissions at that time were made only after inducements through promises of reward by the government agents. The trial judge following the usual practice, first considered and passed upon this matter out of the jury's presence. It was then inquired into in the jury's presence, and the question was submitted to the jury under proper instructions. *United States v. Carignan*, 342 U. S., 36 (1951); *Lyons v. Oklahoma*, 322 U. S. 596 (1944). The complaint in this regard is not well founded.

JUDGMENT

Other questions raised by the defendant have been considered in the light of the briefs, arguments of counsel and the entire record and are found to be without merit. There being no reversible error, the judgment of the district court is affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 204

WILLIAM HENRY HACKETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 23–25) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1962 (Pet. App. 23). The petition for a writ of certiorari was filed on June 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence of petitioner's prior narcotic activities was properly received after the defense of

entrapment had been raised by petitioner on cross-examination of a government informer.

2. Whether petitioner was denied rights under 18 U.S.C. 3500 when handwritten notes of transactions witnessed by narcotic agents were destroyed by the agents after the notes had been embodied in reports which were turned over to petitioner at trial.

3. Whether petitioner's admissions to a narcotics agent were voluntary and properly corroborated.

4. Whether narcotics obtained from petitioner's automobile at the time of his arrest were lawfully seized.

STATEMENT.

A five count indictment returned in the District Court for the Eastern District of Michigan charged the petitioner with the unauthorized sale and distribution of narcotics in violation of 26 U.S.C. 4705(a) and with the receipt and concealment of narcotics, knowing they had been illegally imported into the United States, in violation of 21 U.S.C. 174 (R. 9a–11a).[1] Following a trial by jury, petitioner was found guilty as charged (R. 143a). On March 22, 1961, he was sentenced, as a second offender, to concurrent terms of imprisonment of fifteen years on each count (R. 144a–145a, 163a, 164a). The court of appeals affirmed per curiam (Pet. App. 23–25).

The pertinent facts may be summarized as follows:

[1] The record consists of two separately paginated appendices. Petitioner's appendix in the court of appeals is paginated from 1a through 175a; the government's appendix in the court of appeals is paginated from 1b through 93b. Appropriate page and letter references will be made to the two appendices.

1. THE EVIDENCE IN GENERAL

In March 1960, one Clifton Watson, a friend of the petitioner, was arrested in Detroit, Michigan, on a narcotics charge. Shortly thereafter, Watson agreed to work for the Detroit office of the Bureau of Narcotics as a special employee (R. 68a, 80a, 99a–101a, 121a, 26b–29b, 50b–51b).

On August 18 and September 19, 1960, narcotic agents searched Watson at his residence, gave him money, and concealed on his person a small radio transmitter (R. 51a–52a, 65a, 92a–93a, 95a, 97a). On each occasion, Watson telephoned the petitioner who subsequently entered Watson's home and handed him packages of heroin in exchange for money (R. 53a–54a, 65a–67a, 94a, 96a–97a, 11b). Narcotic agents observed the petitioner enter and leave Watson's residence on the dates in question (R. 69a–70a, 74a–76a, 78a, 84a, 86a, 88a–89a, see R. 53a, 56a, 62a–63a, 83a, 11b, 15b). On the first occasion, using a radio receiver, an agent stationed outside of the residence heard the petitioner remark to Watson that the "measure" (of heroin) was "nice", and that the petitioner had "other stops" to make that day (August 18) (R. 73a–74a). On September 19, 1960, the same agent, still using the receiver, heard the petitioner tell Watson that his "public" had been "bothering" him, and that he had "other packages to mix" (R. 77a–78a). Agents concealed inside the residence either saw the petitioner exchange packages of heroin for money, or overheard conversations between the petitioner and Watson (R. 53a, 65a–66a, 11b; see R. 16b).

In early October 1960, a narcotics agent was sent to the Wayne Metropolitan Airport in Detroit to arrest the petitioner. Accompanied by a Michigan state trooper, the agent arrested the petitioner near petitioner's parked automobile (R. 90a). Heroin was subsequently found inside a camera case which was located in the front seat area of the automobile (R. 50a, 90a–91a, 11b).

2. THE DEFENSE OF ENTRAPMENT

Watson testified on cross-examination that he and petitioner had been close friends and that he had lent petitioner money (R. 31b–36b), and that petitioner agreed to sell him narcotics the first time he asked (R. 36b). Watson also testified they talked about narcotics two or three months before the first sale was made (R. 37b). Watson denied he asked petitioner to help him out because Watson had lent petitioner money, but said he might have told petitioner he could help Watson make some money (R. 37b).

On redirect examination by the government, Watson testified that he had been in the cocaine business in 1958, and that the petitioner was present when he purchased cocaine (R. 105a–106a). Counsel for the petitioner objected to this line of questioning as irrelevant (R. 106a). He stated that the main defense would be entrapment, but argued that this defense raised an issue of law for the court to decide in the absence of the jury (R. 107a, 109a, 41b). The objection was overruled, the court holding that if all the evidence established entrapment the petitioner would be entitled to a judgment of acquittal from the court,

but that the government should not be denied the opportunity to rebut that defense on redirect examination of Watson (R. 110a, 40b–41b).

Watson then testified that he and the petitioner had purchased cocaine from 1958 to early 1960 from sources in Chicago, Cleveland and New York (R. 111a–114a; see R. 46b–49b, 54b–55b, 59b–60b). After his arrest, Watson discussed ways of getting cocaine with the petitioner over the telephone about ten or twelve times (R. 45b, 46b). On some occasions, Watson telephoned the petitioner from Bureau offices, and agents overheard the conversations (R. 116a).

The government also introduced into evidence a copy of a conviction of the petitioner in the United States District Court for the Eastern District of Michigan, which indicated that the petitioner had pleaded guilty in 1951 to a sale of narcotics (R. 123a, 125a).

During redirect examination of Watson, the court instructed the jury that they could not consider the evidence being offered as proof of the offenses charged in the indictment, but that, inasmuch as the petitioner claimed that he was induced to commit the offenses by reason of the activities of the Government's agents, it was allowing government counsel to question the witness "for the purpose of establishing * * * whether or not the defendant was predisposed to commit an offense" (R. 114a–115a; see R. 118a–119a). The judge submitted the issue of entrapment to the jury under full instructions (R. 135a–137a).

3. THE ADMISSIONS OF THE PETITIONER

At the trial, District Supervisor Ross Ellis of the Narcotics Bureau testified to admissions by petitioner. The circumstances were developed out of the presence of the jury. After his arrest, petitioner offered to co-operate with the Bureau. On October 13, 1960, in his office, Ellis interviewed the petitioner, who was out on bond (R. 172a, 60b–61b, 71b, 75b–76b).

Ellis asked the petitioner to review the facts of the case which he had mentioned to the agents at the time he had offered to cooperate, telling the petitioner that he was not required to make a statement (R. 172a, 71b). Petitioner said that he had purchased the narcotics seized at the time of his arrest from a Mr. Akins in New York City, with whom he had dealt since July 1960, and that he would assist the Bureau in building a case against Mr. Akins (R. 62b–64b, 72b–73b). The petitioner asked Ellis what he should do and what he could expect from the Bureau in return (R. 74b–75b). Ellis testified (R. 169a–170a, 65b–66b):

> I told him that he would have to cooperate successfully and obtain evidence, with the Government * * *; that if he did cooperate, that he would have to testify; further, that we could not in his case consent to any dismissal, that there would be no possibility of probation, that he would still be prosecuted in his case, and he would still serve a sentence; that if he were successful in making these cases, that the most that we could recommend would be for my Bureau, by me, to recommend to the United States attorney and to the court that Mr.

> Hackett * * * be permitted to plead guilty to the lesser offense, namely, the purchase, sale and so forth, not in an originally stamped package, which is a charge under the old law; that he was a second offender, and as a result of that the most minimum sentence would be 5 to 20 years. * * * And I told him then that: "Mr. Hackett, if I recommend 5 years, that doesn't mean recommending the minimum, under this reduced charge; that does not mean that the Judge or the United States Attorney is going to agree with me; * * * and if the Judge were to sentence you, say, for ten years, or more than the 5-year minimum, it would not be as a result of our not keeping our word."

Ellis also told the petitioner that, if he cooperated, the Bureau would recommend that Ellis not be incarcerated in the same prison with parties against whom Ellis had given evidence (R. 66b).

The court ruled that the testimony of Ellis was admissible (R. 174a–175a, 77b–78b). Ellis testified to substantially the same facts as developed outside the presence of the jury (see R. 79b–85b). In its instructions to the jury, the court charged, in part (R. 138a–139a):

> A voluntary admission is one made on the basis of free choice. It need not be volunteered in the sense of being made without request. However, to be voluntary, it must have been the result of a choice in a free mind and not the result of pressure, inducement or promise of reward by the interrogating official, which, of course, would make a truly free choice impossible.

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> * * * The slightest menace or threat, or any hope engendered or encouraged, that the defendant's case will be lightened or more favorably dealt with if he will confess, is enough to exclude the confession thereby superinduced; and any words spoken in the hearing of the prisoner which may in their nature engender such fear or hope, renders necessary that a confession made within a reasonable time afterwards shall be excluded, unless it is shown by clear and full proof that the confession was voluntarily made after all trace of hope or fear had been fully withdrawn or explained away.

4. THE "JENCKS ACT" ISSUES

At the trial, narcotic agents testified that they took notes of their observations of transactions involving the petitioner, that they used their notes in the preparation of reports and memoranda in the case, and that they destroyed their notes after the reports had been prepared (R. 12b–13b, 16b–17b, 19b–20b, 23b). The reports of the agents who testified were either turned over to counsel for the petitioner or given to the court for *in camera* inspection (R. 78a–79a, 80a–81a, 102a–104a, 12b, 16b, 19b, 20b, 23b, 27b, 33b). The court ordered the production of some reports or parts of reports to the defense, and sealed other reports or parts of reports it found did not fall within 18 U.S.C. 3500(e) (R. 78a–79a, 80a–81a, 86a–88a, 102a–104a, 27b, 33b).

Statements made by Watson to narcotic agents on August 18 and September 19, 1960, were turned over to the petitioner at the conclusion of Watson's

direct examination (R. 27b). During cross-examination, Watson testified that he "imagine[d]" that the narcotic agents took notes of an interview with him when he discussed the purchases of narcotics in Chicago, Cleveland and New York (R. 166a, 52b). When asked to name the agents who took the notes, he replied that Agent Vernier was one (R. 166a, 52b). At that point, counsel for the petitioner requested the production of "any notes that were made by any agent relative to what [Watson] told them concerning these particular acts" (R. 166a–167a, 53b). When the court stated that it could rule upon the production only after the testimony showed what was involved, counsel for the petitioner asked for and was given permission to "go further into it" (R. 167a–168a, 53b–54b). Watson testified that he had never seen any such notes, nor had any such notes been read to him (R. 54b). Counsel for the petitioner then questioned Watson on other matters.

At a later stage of the trial, the court brought up the subject of the petitioner's request "for the report or statement taken from the witness Watson" (R. 170a–171a, 67b). Government counsel stated that he had inquired into the matter and was not aware of any statements of any nature, other than the two that had been produced which would be subject to production under the Jencks Act (R. 171a, 67b–68b).

At a later point, the following colloquy transpired (R. 175a, 78b–79b):

> The COURT: Now, I forgot to take up the matter of the report of the conversation between the witness Watson and the agents.

> What is the position of the Government?
>
> Mr. MOORE [Counsel for the Government]: Your Honor, after looking through the various files here, we find that there are no such notes in existence now, or reports made from such notes, so we don't know of anything that we can produce under the request made.
>
> The COURT: Does the Government have, so that I may get that exactly as it is, does the Government have in its possession any memoranda or other reports indicating any statements made by the witness Watson to any Government agent or any other person?
>
> Mr. MOORE: No, there are none that we know of.

At the conclusion of the Government's case, Agent Vernier was recalled for further cross-examination (R. 89b). Counsel for the petitioner questioned Vernier regarding conversations with Watson, but never asked Vernier whether he had made any notes of these conversations (R. 89b–90b). Petitioner made no further demand for notes, reports or statements.

ARGUMENT

1. Petitioner contends (Pet. 8–12) that the trial court erroneously allowed the government to introduce evidence of his prior narcotic activities to rebut the defense of entrapment, which he claims at that point in the trial had not yet been affirmatively raised.

The record shows, however, that the government did not seek to introduce evidence of the petitioner's prior narcotic activities through redirect examination of Watson until *after* the petitioner, on cross-examination of Watson, raised the defense of

entrapment. Before this testimony was introduced, the petitioner told the court that his "main line of defense" was entrapment (R. 107a, 109a, 41b). It was therefore permissible for the government to seek to rebut this defense through proof that the petitioner was predisposed to commit the instant offenses. *Sherman* v. *United States*, 356 U.S. 369, 375–377; *Sorrells* v. *United States*, 287 U.S. 435, 451.

In the circumstances, the government's rebuttal evidence properly came in on re-direct examination of Watson. Indeed, if the testimony as to predisposition had not been given at that point the matter would have been foreclosed, since petitioner offered no defense testimony.

The contention (Pet. 12–13) that the defense of entrapment should be decided by the court and not by the jury was rejected in *Sherman* v. *United States*, 356 U.S. 369. Petitioner presents no new considerations.

2. Petitioner's contention (Pet. 13–14) that the destruction by the narcotic agents of their notes constituted a "flagrant * * * frustration of the intent and purpose" of 18 U.S.C. 3500 is without merit. The notes in the instant case were not "statements" within 18 U.S.C. 3500(e) (1) or (2). They were merely the personal memory aids of the agents, not shown to anyone, and used by the agents to prepare official reports on the case. The reports, which embodied the events the agents had observed on the dates in question, were turned over to the petitioner.

There was thus no reason for the agents to retain their notes.

There is no foundation for the petitioner's contention (Pet. 14–15) that the trial judge abdicated his responsibility in favor of the prosecutor by informing the petitioner that unless he could prove to the court that notes of an interview with Watson qualified as statements under the Jencks Act, he would not order the Government to produce them. As shown by the Statement, *supra,* Watson testified that he "imagine[d]" that notes were taken by narcotic agents during an interview and that Agent Vernier was one of the agents who took those notes. Watson later testified that he did not see the notes in question, and that no one read any notes to him. Government counsel subsequently informed the court that, after checking the files of the case, he was unable to find any notes of the agents or statements of Watson, other than the two which had already been turned over to the petitioner. On recross-examination of Agent Vernier, petitioner questioned the agent about conversations with Watson, but did not ask the agent if he had taken any interview notes. There was therefore no reason for the judge to order notes produced or to pursue the matter further.

The case is thus materially different from *Campbell* v. *United States,* 365 U.S. 85, where the witness testified that he thought he had read over and signed the agents' notes, and that the report prepared by the agent on the basis of the notes was not an accurate account of what he had said. This Court held that under such circumstances it was error to

place upon the defendant the burden of calling the agents to show why the notes had been destroyed. Here there was no proof that Agent Vernier took notes during an interview with Watson, and no showing that Watson adopted any notes.

3. Ellis testified that the petitioner told him, *inter alia*, that he had purchased the narcotics found at the time of his arrest (the basis for count 5) from a source in New York. See the Statement, *supra*. Petitioner contends (Pet. 17) that something more than "the unsupported testimony of an interested party" should have been "required" to establish the making of such oral confession. The short answer is that there is no requirement in the federal courts calling for corroboration of the *making* of an oral, extra-judicial confession. *Cash* v. *United States*, 265 F. 2d 346, 347 (C.A.D.C.). The only requirement is that there be some evidence to corroborate recitals in an extra-judicial confession, although the corroborative evidence need not be sufficient to establish the *corpus delicti*. *Opper* v. *United States*, 348 U.S. 84; *Masse* v. *United States*, 210 F. 2d 418, 420 (C.A. 5), certiorari denied, 347 U.S. 962; *Ryan* v. *United States*, 99 F. 2d 864, 870 (C.A. 8), certiorari denied, 306 U.S. 635; cf. *Smith* v. *United States*, 348 U.S. 147, 152–154. In the instant case, the narcotics found in the automobile furnished independent evidence of the *corpus delicti*.[2]

[2] Petitioner asserts (Pet. 17) that, prior to trial, he moved for discovery of all the statements made by the Defendant under Rule 16 and Rule 6(a) of the Federal Rules of Criminal Procedure, and the United States Attorney at that time informed the court that no such statements were made. These recitals are misleading. Petitioner moved for production and

The confession was not involuntary (see Pet. 18). It was made to Ellis *before* the petitioner asked what he could expect from the Bureau of Narcotics for his proposed co-operation (R. 74b–75b). The case, therefore, is materially different from *Crawford* v. *United States*, 219 F. 2d 207 (C.A. 5), on which the petitioner relies, where promises and inducements were made by narcotic agents to the defendant *before* he admitted involvement in the narcotics traffic and named his supplier.

The practice of receiving evidence on the issue of voluntariness outside the presence of the jury in order to rule upon admissibility in the first instance, followed by the submission of the issue of voluntariness to the jury, is familiar practice. *Wilson* v. *United States*, 162 U.S. 613, 623–624; *United States* v. *Carignan*, 342 U.S. 36, 38; *Wagner* v. *United States*, 110 F. 2d 595, 596 (C.A. 5), certiorari denied, 310 U.S. 643; *Smith* v. *United States*, 268 F. 2d 416, 420–421 (C.A. 9); *Wright* v. *United States*, 250 F. 2d 4, 13 (C.A.D.C.).

4. Before trial, the petitioner moved to suppress the heroin found in his automobile at the time of his arrest. Since that issue goes only to count 5 of the indictment, which is not necessary to support the

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for permission to inspect and copy "all books, records, transcripts, documents, reports, memoranda, statements, notations, recordings, and including, but not limited to the foregoing, any and all written and recorded material whatsoever, obtained from or belonging to the Defendant, or obtained from others by seizure or by process * * * for purposes of trial" (R. 18a). The motion was denied except insofar as the court ordered the government to furnish information as to the time and places of the alleged violations (R. 34a–35a).

verdict, it is not really presented by this case. In any event, the point is without merit.

At the hearing on the motion to suppress, petitioner did not testify or offer any evidence. The government's evidence showed that in September or early October, 1960, the petitioner told Watson that his supply of narcotics was running low and that he expected to go to New York to get an additional supply (R. 6b–9b). On October 4, 1960, Watson told Agent Vernier that petitioner had left for New York and that Watson had seen petitioner's automobile parked at the Wayne Airport (R. 36a, 6b, 9b). The fact that the automobile was there was confirmed by Michigan police (R. 37a). At about noon on October 6, 1960, the petitioner was observed near his automobile. Agent Notel and a state trooper walked up to the petitioner, identified themselves, and Notel placed the petitioner under arrest (R. 41a, 42a, 44a–45a, 10b). Petitioner said that he just got off an airplane and that a camera case, found by the officers on the front seat of his automobile, belonged to him (R. 11b). A brown paper bag, the contents of which on subsequent analysis proved to be heroin (see R. 50a), was found inside the camera case (R. 42a). The court denied the motion, holding that petitioner was lawfully arrested on probable cause to believe that he was committing a violation of the narcotic laws, and that the search and seizure in question were lawful incidents of that arrest (R. 46a, 47a).

[3] Agent Notel testified that something had been done to the petitioner's automobile to make it not function (R. 41a, 43a). The automobile had a flat tire, and its hood was raised (R. 41a, 10b).

The court's ruling accords with *Draper* v. *United States*, 358 U.S. 307. Under 26 U.S.C. 7607, the agents were authorized to arrest without a warrant on probable cause to believe that the petitioner had committed a felony relating to narcotics.

At the trial, Watson testified that he did not personally go to the airport and see petitioner's car and that he did not recall giving such information to Agent Vernier (R. 122a–123a). However, this does not negate probable cause to arrest petitioner. The agents already had information, which they had verified, of sales of narcotics by petitioner to Watson in August and September. They thus had reason to believe that a trip by petitioner might well be to obtain an additional supply of narcotics. They did not rely on Watson's testimony that the car was at the airport but verified that fact for themselves. The total information was sufficient to justify the arrest of petitioner without a warrant and the search incident thereto.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 204

WILLIAM HENRY HACKETT,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

GOLDFARB and HUDNUT,
ALBERT A. GOLDFARB,
Attorneys for Petitioner,
2001 Cadillac Tower,
Detroit 26, Michigan.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 204

WILLIAM HENRY HACKETT,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING

Petitioner prays that this Honorable Court will rehear the Petition for Writ of Certiorari filed in the above entitled cause and docketed on June 25th, 1952.

ORDER

On the 9th day of October, 1962, this Honorable Court entered an Order denying the Petition for Writ of Certiorari filed in the above-entitled cause to review the judgment of the United States Court of Appeals for the Sixth Circuit. Justice White and Justice Goldberg did not consider the Petition.

QUESTIONS PRESENTED

1. Did the Trial Judge err in refusing to grant the Petitioner an opportunity to renew his Motion to Suppress the Evidence at the trial?

2. Was the denial of a preliminary examination a deprivation of the rights granted the Petitioner under the Federal Rules of Criminal Procedure, such as to deny the Petitioner due process of law?

SUPPLEMENTARY STATEMENT OF FACTS

The Petitioner was charged with violation of the Federal Narcotics Laws, specifically 21 U.S.C. 174 and 26 U.S.C. 4705(a) in an Indictment rendered on November 2, 1960. At the time of Petitioner's arrest narcotics were seized from a camera bag which he allegedly had in his possession. The Petitioner, by his Attorney, moved to suppress the evidence as a result of an illegal search and seizure, which Motion was denied on the basis that the Federal Agents were acting upon information received from a reliable Informer. During the course of the trial, the Informer denied under oath that he had given the information to the Federal Agents. At this time the Petitioner sought to renew his Motion and the Trial Judge refused to permit him to renew the Motion on the grounds that it could not be raised again during the trial.

When the Petitioner was arraigned, the date for a preliminary examination was set. The Petitioner and his Attorney appeared in Court on the date set for the preliminary examination before the Honorable Judge Feikens, District Judge for the Eastern District of Michigan. At that time,

the United States Attorney requested an adjournment of the preliminary examination because certain witnesses were unavailable. Petitioner objected to an adjournment stating that he was prepared for the examination at that time and desired to proceed. District Judge Feikens indicated on the record that he felt that Petitioner was entitled to a preliminary examination and the Government Attorney stated that he would be prepared for an examination in one week. District Judge Feikens then adjourned the examination for one week with a stipulation that it would be held at that time. During the interim, the United States Attorney obtained an Indictment against the Petitioner and he was denied any preliminary examination or other opportunity to determine the nature of the case which the Government had prepared against him. Petitioner then made a Motion to Quash the Indictment and remand the case for preliminary examination on the grounds that the adjournment was fraudulently obtained. At the hearing on the examination, the Government Attorney testified under oath that at the time he requested the continuance he had in fact no intention of permitting the Petitioner a preliminary examination. District Judge Freeman, who heard the Motion, denied it and ordered the case set for trial.

REASONS FOR GRANTING A REHEARING

1. The facts and circumstances surrounding the Petitioner's arrest and the search of his person and the automobile, which were set forth in the Petitioner's Petition for a Writ of Certiorari previously filed in the above-entitled matter, indicate that the search was illegal. The Court's refusal to permit the Petitioner to renew his Motion at the time the unreliability of the Informer was as-

serted, denied the Petitioner due process of law. In *DiBella v. United States*, 369 U. S. 121 (1962), decided subsequent to the trial in the above-entitled matter, this Court decided that a Motion to Suppress Evidence must be renewed at the trial and is not appealable prior to trial. Therefore, the law upon which the Trial Judge relied in denying the Petitioner the right to renew his Motion was erroneous in the light of the *DiBella* case and the admission of the illegally seized evidence was a denial of due process of law. At the time the Motion was made prior to trial, the basis for denying it was the reliability of the Informer from whom the Government Agents obtained the information leading to the Petitioner's arrest. At the time of trial, the unreliability of the Informer became apparent from his own statements on the witness stand, but the merits of the Motion were restricted to the testimony available prior to the trial. Therefore, although the search was illegal and the evidence should have been suppressed, the refusal of the Trial Judge to permit the Motion to be renewed at the time of trial, permitted the Government to introduce evidence which had been seized in violation of the Petitioner's Constitutional rights.

2. The action of the United States Attorney in obtaining a continuance of the preliminary examination for the sole purpose of depriving Petitioner of his right to such examination was unwarranted by the Federal Rules of Criminal Procedure and resulted in the deprivation of the rights guaranteed to the Petitioner by Rule 5 of the Federal Rules of Criminal Procedure. Bad faith of the United States Attorney in obtaining such a continuance was clearly illustrated by the testimony at the hearing on the Motion to Quash the Indictment. Under oath the United States Attorney stated that his witnesses were not available because "We had no intention of holding the pre-

liminary examination on October 27th". (Appellant's Appendix, page 27a.)

The language of Rule 5 of the Federal Rules of Criminal Procedure granting the Petitioner a right to a preliminary examination is mandatory, not permissive. It states that if the Defendant does not waive the right to a preliminary examination, he *shall* have a right to have the evidence heard within a reasonable time. Being apprised of Judge Feikens' statements that the Judge felt the Defendant was entitled to know the nature of the Prosecutor's case, the Government Attorney resorted to fraudulent statements of his true intent in order to obtain time, ostensibly for the purpose of obtaining certain witnesses, but actually for the purpose of obtaining an Indictment and thereby denying the Defendant his right to a preliminary examination. When a District Attorney is permitted to resort to subterfuge and misrepresentation to win a case, and may freely admit that he had no intention to do what he represented he would do, then no longer may citizens be secure in the thought that their basic freedoms are protected by the Constitutional guarantee of fairness, embodied in the Bill of Rights. If a Prosecutor feels himself frustrated in his goal to convict the accused, he may then use any manner of subterfuge, limited only by his audacity and his imagination to circumvent the Constitutional obstacles set up to protect the accused.

In the instant case, the Prosecutor asked to be sworn and under oath he testified not only that he had no intent to go forward with the preliminary examination, but also that the practice in which he was engaging was the common procedure in that office. (Appellant's Appendix 27a, 28a.)

The fact that it is the common practice of the Department does not justify it; in fact, it only illustrates more clearly how corroded the processes of judicial administration at the prosecution level have become. This Court in the exercise of its supervisory jurisdiction of Lower Federal Courts and the Department of Justice should review this type of practice since it is the common practice of the Prosecutor's office and take this opportunity to define the limits within which a preliminary examination may be denied to an accused, after he has requested it.

CONCLUSION

For the foregoing reasons and the reasons contained in the Petition for a Writ of Certiorari, heretofore filed, it is respectfully prayed that this Honorable Court will rehear and reconsider its decision in the above-entitled cause.

Respectfully submitted,

GOLDFARB and HUDNUT,
ALBERT A. GOLDFARB,
Attorneys for Petitioner,
2001 Cadillac Tower,
Detroit 26, Michigan.

Dated this 31st day of October, 1962,
Detroit, Michigan.

CERTIFICATE OF COUNSEL

Albert A. Goldfarb, being first duly sworn, deposes and says that:

He is a duly licensed attorney in the State of Michigan and has been admitted to practice before the Bar of the Supreme Court of the United States.

That he has been retained by the Petitioner to prepare this Appeal in his behalf.

That he has prepared the attached Petition and knows the contents thereof.

That the attached Petition for Rehearing has been submitted because he believes it is based upon meritorious grounds and not interposed for the purpose of delay.

That the attached Petition for Rehearing raises new matter not considered in the prior Petition for Certiorari and is related to such new matter.

Albert A. Goldfarb,
Attorney for Petitioner,
2001 Cadillac Tower,
Detroit 26, Michigan.

Dated this 31st day of October, 1962,
Detroit, Michigan.

Subscribed and sworn to before me this 31st day of October, A. D. 1962.

Elizabeth M. Fox,
Notary Public, Wayne County, Michigan.
My commission expires August 24, 1964.